

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWARD KARPINSKI	:	CIVIL ACTION
	:	
vs.	:	
	:	
ROLL INTERNATIONAL CORPORATION,	:	NO. 06-5476
REALTY ASSOCIATES FUND VI LP and	:	
HOWARD LUCKER	:	

MEMORANDUM

ROBERT F. KELLY, Sr. J.

APRIL 2, 2007

Presently before the Court are Defendants' Howard Lucker and Roll International Corporation Motion to Dismiss pursuant to FRCP 12(b)(1) and (6) (Doc. No. 5), and Defendant Realty Associates Fund VI LP Motion to Join (Doc. No. 3). According to the Complaint this *pro se* Plaintiff was an employee of the Franklin Mint Company in Delaware County, Pennsylvania when a sudden emergency required him to be taken to Riddle Memorial Hospital. This occurred on February 24, 2003, Plaintiff never returned to work at the Franklin Mint and because the Franklin Mint has since closed its doors he has been unable to recover his personal property. Plaintiff claims his personal property is valued at \$11,518.60.

JURISDICTION

Paragraph 2 of the Complaint alleges that this Court has diversity of jurisdiction of this case under 28 U.S.C. § 1332 and federal question jurisdiction under 28 U.S.C. § 1331 and 42 U.S.C. § 1983.

Paragraph 13 of the Complaint alleges that "at all relevant times, Defendants were acting within the course and scope of their employment and under color of state law." The

underlined portion of the above paragraph is the only reference in the Complaint to the Defendants acting under color of state law. There is no statement as to how or why these companies and this individual are state actors.

In their 12(b)(1) and (6) motion Defendants' Howard Lucker and Roll International Corporation attached an affidavit stating that neither have ever operated as a government entity or government employee.

In its motion to join in the 12(b)(1) and (6) motion filed by Realty Associates Fund VI, LP, Realty Associates Fund VI alleges that it is a private company not a state actor and attaches a printout from the Pennsylvania Department of State website listing Realty Associates Fund VI LP as a Pennsylvania Limited Partnership.

There can be no federal jurisdiction under 42 U.S.C. §1983 because I find that no Defendant was a state actor. This finding is based on the affidavits and allegations of the Defendants' motion which are deemed admitted in view of the failure of the Plaintiff to respond in any way to these pleadings.¹

A case is properly dismissed under FRCP 12(b)(1) "where the alleged claim under the Constitution . . . is wholly insubstantial and frivolous." Bell v. Hood, 327 U.S. 678, 682, 66 S.Ct. 773, 776 (1946). In deciding such a motion, the Court is "not limited to the facts of the pleadings." Taylor Investment, Ltd. v. Upper Darby Township, 983 F.2d 1285 (3d Cir. 1993). "Rather, as long as the parties are given an opportunity to contest the existence of federal

¹*Pro se* Plaintiff never responded to either the original 12(b)(1) and (6) motion or the motion to join in that motion which were both filed on February 13, 2007. On February 23, 2007 Plaintiff requested an extension of time to file a response to these motions. On February 27, 2007 we granted an extension to March 15, 2007. Despite that extension no response has been filed by Plaintiff.

jurisdiction, the Court ‘may inquire by affidavit or otherwise into the facts as they exist.’”

Armstrong World Industries, Inc. v. Adams, 961 F.2d 405, 410, n. 10 (3d Cir. 1992). Unlike a motion made under Rule 12(b)(6), “the Court is ‘free to weigh the evidence and satisfy itself as to the existence of its power to hear the case.’” Boyle v. Governors Veterans Outreach & Assistance Center, 925 F.2d 71, 74 (3d Cir. 1991), see also Glendon Energy Company v. Borough of Glendon, et al., 836 F.Supp. 1109 (E.D.Pa. 1993).

It is clear also that there is no federal diversity jurisdiction under 28 U.S.C. § 1332 because Plaintiff Edward Karpinski is a resident of the State of Pennsylvania, see Complaint ¶ 8 as are Defendant Howard Lucker, see Complaint ¶ 7 and Defendant Realty Associates, see ¶ 3 of Joinder Motion.

For the above reasons we enter the following Order.

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HOWARD LUCKER	:	

ORDER

AND NOW, this 2nd day of April, 2007, it is hereby **ORDERED** that

1. The motion of Realty Associates Fund VI LP to join the Motion to Dismiss under 12(b)(1) (Doc. No. 3) is **GRANTED**.

2. All Defendants' Motions to Dismiss under FRCP 12(b)(1) for lack of subject matter jurisdiction (Doc. No. 5) are **GRANTED**.

BY THE COURT:

/s/ Robert F. Kelly
ROBERT F. KELLY
SENIOR JUDGE